6-624

Supreme Court of the United States

No. 225.

BENJAMIN STARK,

APPELLANT,

vs.

LEWIS M. STARR.

Appeal from the Circuit Court of the United States for the District of Oregon.

APPELLANT'S BRIEF.

J. S. BLACK,

Counsel.

BYRON O'NEIL BROTHERS PRS.

STARK,

Appellant,

vs.

STARR,

Appellee.

This was a Bill in Equity, brought in the Circuit Court of the United States for the District of Oregon, by Starr against Stark, averring that plaintiff (Starr) was the true owner of Block No. 81, in the City of Portland, and that the defendant (Stark) falsely set up a claim thereto, and praying that the rights of the parties be determined, so that the cloud upon plaintiff's title may be removed.

Another bill for exactly the same purpose, to determine the same rights between the same parties, (or their privies), on the same subject matter, (to wit, Block 81), was brought on the 13th of January, 1864, in the State Court, where the plaintiff's title was sustained, first by the Circuit Court of Multnomah County and afterwards by the State Supreme Court: but on writ of error from

this court, the case was reviewed, the decree was reversed here, and on your mandate a final decree dismissing the plaintiff's suit was entered in the State Court. The case is reported in 6 Wallace, 402.

After the determination of that suit, Mr. Stark being the legal owner of the land in controversy, and all the asserted equities between him and Starr being adjusted by a final decree in his favor, brought his action at law (ejectment) and recovered a judgment for the property with damages for detention and costs. The present suit, brought since the recovery in ejectment, again avers that Starr is, and that Stark is not, the equitable owner of the Block in dispute, and prays that Stark may be restrained from issuing execution, and compelled to convey, &c.

The defendant, on hearing the cause, presented the full record of the suit commenced in 1864, and showing the decree in his favour, insisted, that it alone, without more, was a complete answer to the plaintiff's bill. Deady, the District Judge, thought the plaintiff concluded by the former decree, but the Circuit Judge (Sawyer), ruled that this suit, though it was between the same parties and directly on the same subject matter, might be sustained as being based upon grounds which were not taken in the former case. See the record of the first suit on pp. 61 to 102 of the printed transcript.

This raises a question of law which we admit to be interesting, but we cannot be brought to believe that it is at all doubtful.

We give a brief history of the transactions upon which the plaintiff relies in this suit to establish his equi-

table title. A very slight consideration of them will be sufficient to satisfy the court that the plaintiff never had any equities; that, if he had adduced these facts in the former case, he would have failed to get a decree; that he ought to fail here for want of merit, without reference to the estoppel of the former decree; that, when he abandoned these grounds of recovery on the former hearing, he did himself no injustice, since he gave up nothing which he could have reasonably expected to maintain.

It is not necessary to go back in the history of the title further than 1849, at which time Stark and one Daniel H. Lownsdale were tenants in common of a 640 acre tract within which the city of Portland was laid out.

Stark at that time, though a resident of Portland, was absent in the Eastern States, and Lownsdale was in possession of the land, apparently as sole owner, laying off lots, and selling them.

March 22d, 1849, Lownsdale conveyed to Stephen Coffin one-half of his interest.

December 13th, 1849, Lownsdale and Coffin conveyed to William W. Chapman one-third of their interest.

From that time the three persons named, that is to say, Lownsdale, Coffin and Chapman, held the land as partnership property, and, as partners, laid off, sold lots, and conveyed title to the purchasers. Stark, not being present to assert his right as owner of one undivided half, seems to have been quietly ignored; but there is no reason to suppose that they intended to cheat him.

They did no act which amounted to an ouster. They expected, no doubt, in proper time to make a full adjustment with him of his proper rights.

Early in the month of January, 1850, Lownsdale left Portland and went to San Francisco, where he met Stark, either accidentally or by appointment, it does not appear which. They two agreed to prevent all future controversy by making a partition of the land which previously they had held in common. This contract was reduced to writing, and executed on the first of March, 1850. A line was fixed upon through the middle of the tract running east and west, about where Stark street now is. All land lying north of that line it was agreed should be held by Stark and his grantees, free from any claim of Lownsdale or his grantees, except as specially excepted. Lownsdale was to have in severalty all the land lying south of the dividing line. (For agreement, see p. 8 of Record.)

Neither of these parties desired that the rights of third persons who had purchased lots from Lownsdale, or his partners, should be disturbed, and therefore a covenant was inserted that Stark should confirm the sales of certain described lots made north of Stark street, previous to the first of January, 1850, without receiving or claiming any portion of the price for which they were sold. And as to sales made between the first of January, when Lownsdale left Portland, and the first of March, which was the date of the written contract, they also should be confirmed to the purchasers, but Stark should be entitled to the purchase money.

It will be perceived that this agreement was made between Lownsdale and Stark alone. Neither Coffin nor Chapman, nor any of the lotholders who had purchased from Lownsdale, were parties to it. But the interests of all being carefully guarded, and the bargain being a very advantageous one to them, it was safe to suppose they would make no objection, but give their assent to it very gladly. Nevertheless, out of abundant caution a covenant was inserted, that in case any grantee of Lownsdale should refuse to confirm the agreement, Lownsdale, upon the demand of Stark, within six months would consent to a rescission.

No lot-holder under Lownsdale made any objection, nor did either Coffin or Chapman object. These last named persons ratified and confirmed the contract between Lownsdale and Stark in the most emphatic way they could by taking possession of the land south of Stark street. They divided it between them, and got patents for it from the United States according to their own division and according to the contract between Lownsdale and Stark.

These acts certainly gave Stark a good title, made him sole and exclusive owner in severalty of all land within the town site north of the line agreed upon, except those lots or parcels which fell within the operation of the covenant before mentioned for the confirmation of sales previously made by Lownsdale or with his authority. That covenant is here transcribed from page 9 of the record before you.

"And the said party of the first part, so far as his "right, title and interest are concerned, hereby ratifies "and confirms all conveyances made by the said party of "the second part, or his lawful attorney, previous to the "first day of January, one thousand eight hundred and "fifty, of the following lots, namely: lots numbered one "and three, in block twenty-six, lots numbered one, three "and four, in the block where the school-house stands; "and lots numbered one, two, three and four in block "numbered seventeen—all said lots lying north of said "line, and being numbered and described on the plat of "the town of Portland aforesaid; and the said party of "the first part likewise ratifies and confirms all grants or "conveyances made by said party of second part, or his "lawful attorney, in good faith, and for a valuable con- "sideration, to this date, subsequent to said first day of "January, of lots situated north of said line: provided "always, and the said party of the second part hereby "covenants for himself, his heirs, executors and adminis- "trators, that he will pay over all sums of money which "have since the first day of January been or may here- "after be paid unto the said party of the second part, his "heirs, executors, administrators or assigns, for and in "consideration of the grants and conveyances aforesaid."

This provision in Stark's agreement with Lownsdale cuts a most conspicuous figure as the foundation of what plaintiff alleges to be his equitable title.

Let it be remembered that the land in dispute (Block No. 81,) is upon the north side (Stark's side) of the Division line, and that it is not among the specified lots of which Stark agreed to ratify the conveyances previously made. Recollect also that Starr is now claiming

under Chapman, and stands in his shoes. Then consider the question whether Chapman or the plaintiff through him has, or ever had, a conveyance, right or title in equity or law which Stark ratified or was bound to ratify. The affirmance of this by the plaintiff is made to rest on certain facts extrinsic to the agreement itself, which are as follows:

Immediately before Lownsdale left Portland for San Francisco, to wit: 7th January, 1850, he made a power of attorney to Chapman to "superintend and "transact my business in said Territory during my "absence, to do and perform anything pertaining to my "interests in Oregon, which he in his judgment may "think advisable." Added to this, by a most suspicious looking interlineation in Chapman's hand, are the words "particular in signing deeds to Portland lots." I do not find, however, any assertion made on the hearing that the interlineation was fraudulent, though Chapman's own explanation is very unsatisfactory. We assume that the paper is genuine.

During Lownsdale's absence, to wit, on the twentieth of March, 1850, Chapman and Coffin came together and agreed that Chapman should have Block 81 as his own separate property, another being taken by Coffin, and a third being assigned to Lownsdale. The two lots assigned to Coffin and Lownsdale *lie south* of the Dividing line. In pursuance of this arrangement (which was wholly unknown to Stark and Lownsdale,) Chapman, acting under the power of attorney from Lownsdale and

joining with Coffin, *made a deed to himself* for the Block in dispute, and under that deed *by* himself, *to* himself, and *for* himself, he went into possession, as if he had a good title in severalty. Under that same deed Starr claims it now as the alienee of Chapman. (See Deed on p. 30 of Record.)

This transaction could give no title to Chapman, because:

1. Chapman's conveyance to himself as the attorney of Lownsdale was a fraudulent, and therefore void, use of his power. We maintain that no attorney or agent can convey his principal's property to himself, or make any contract with himself for his own benefit about his principal's business, and all attempts to do so are void merely.

2. Coffin was *in pari delicto* with Chapman. The former was bound to know, and did know, that the latter was making a false, improper and unlawful use of the authority given him by Lownsdale. The pretended conveyance to Chapman being the joint act of both these persons it was wholly void. Therefore Chapman did not acquire even the right which Coffin could have conveyed by a lawful deed.

3. Lownsdale could not have made a conveyance to Chapman if he had been personally present and signed the deed with his own hand; for he had, before that time, by a valid instrument, formally divested himself of all title to the land in controversy and transferred it to Stark. Lownsdale had then no estate or interest that he could convey to anybody, either in person or by attorney.

4. At the date of this deed, Coffin and Chapman knew very well that Stark was, and had all along been, the owner of an undivided half of the whole tract, including this block. They assert that they were then ignorant of the agreement which gave him the *whole* of it, but their knowledge of his *half* ownership is not denied. The deed to Chapman was an inexcusable attempt to appropriate Stark's property without his consent, and behind his back. A claim of title founded upon such an act is destitute of all merit.

5. Stark was not bound by his covenant with Lownsdale to ratify this thing. The agreement itself was *ipso facto* a ratification made before January 1st, 1850, of certain lots specifically enumerated and mentioned. This was not one of them. Nor was it a sale or conveyance before the first of January—nor was it a sale in good faith after January 1st and before March 1st, which Stark might be called on to ratify upon tender of purchase money. In fact it was no sale at all, but a mere nullity, incapable of being ratified.

Nevertheless, Chapman insisted that Stark ought to give him this Block without money and without price, in addition to all that he had already given to him and his partners by the agreement. When Lownsdale came home and showed what he had done, Chapman, combining with Coffin, made the following paper.

"We, Stephen Coffin and W. W. Chapman, partners with Daniel H. Lownsdale, in the town of Portland, hereby ratify and confirm a certain agreement between

Benjamin Stark and H. D. Lownsdale, bearing date the first day of March, A. D. 1850, respecting an adjustment of title, hereby placing the disposition of property up to notice of said adjustment upon the same footing with the disposition of property before the first day of January last.

In testimony whereof, we have hereunto set our hands and seals, this, the thirteenth day of April, A. D. 1850.

S. COFFIN. (L. S.)
W. W. CHAPMAN. (L. S.)"

What did this amount to? It was another effort to get Stark's property away from him without paying for it. It was an attempt to abrogate, alter and change the contract of Lownsdale and Stark, without the consent of either, and against the express will of both. Of course it did not change the rights and obligations of any party.

Then Chapman, aided by Coffin, attempted to get a title out of one Couch, who had once been employed by Stark in a general way to look after his business in Portland, but whose power had been superseded by the appointment of another attorney. He was induced to sign the following appendix to the paper of thirteenth of April, 1850.

"PORTLAND, O. T., April 15, 1850.

I ratify the above agreement as far as my interest is concerned in said property.

JOHN H. COUCH,
for BENJAMIN STARK."

The "above agreement" which Couch says he ratifies, is the agreement between Chapman and Coffin

of the thirteenth of April. The plaintiff asserts, that the notification of that agreement operated to ratify the agreement of March 1st, between Stark and Lownsdale, with a modification—and this latter modification ratified Chapman's deed to himself for Block 81.

We deny that this agreement between Coffin and Chapman, and the little appendix signed by Couch, had any effect whatever upon the title of Block 81. It neither divested Stark's title nor added anything to the force of Chapman's deed to himself. We say this for the following among other reasons:

1. It purports to be a confirmation of the agreement between Stark and Lownsdale. If it was a confirmation, then it gave the whole title to Stark, for so the agreement expressly provided.

2. If it was not a confirmation, but an attempt to change the terms of the contract, then it was wholly unauthorized, and the attempt was a total failure.

3. Couch was not the attorney of Stark, and did not pretend to act in that capacity. He says, "I ratify "the above agreement *as far as my interests* are con- "cerned." He says nothing about the rights or interests of Stark. After he signed the paper he or somebody else added below his name the words "for Benjamin Stark." But that surely does not change the meaning of the words written above his name, nor is it a declaration that he is Stark's attorney.

The judge of the circuit court sustains the plaintiff in putting upon these papers a construction precisely

opposite to that which is expressed; he says the language is open to criticism as being insufficient to accomplish the object claimed. But he assigns one meaning to them while they express another, by looking at "surrounding circumstances," and "the condition of things which gave them birth," and placing himself "in the seats of the parties themselves." If this court affirms that written instruments may be made to mean what they do not say for such reasons as those given by Judge Sawyer, the rights of men will become exceedingly uncertain.

In truth and in fact all these averments that the deed to Chapman of twentieth of March was confirmed and all the evidence adduced for the purpose of sustaining those averments are answered in a breath. The act which the plaintiff says was ratified was a mere nullity, and therefore could not be ratified.

The plaintiff has tried to eke out an equitable title by asserting a verbal agreement between him and Stark after his purchase from Chapman. This is in the face of the statute of frauds, and besides that, it is not true in point of fact. The defendant in his answer distinctly denies that he ever at any time assented to the appropriation of block 81 by Starr, or anybody under whom Starr claims, or said anything from which they could reasonably infer that he intended to relinquish his title to them. But, on the contrary, they had from the beginning distinct notice that the land belonged to him and that he meant to have it. Starr himself is the only witness by whom the answer is contradicted. The judge chooses to

believe Starr and disregard the defendant's answer as containing mere loose and general allegations. There never was anything more directly responsive, or more clear, or more specific, than the statements of the defendant in his answer.

There is a rule of pleading and evidence which no court of equity can safely disregard. It commands, that where a defendant denies an allegation contained in the plaintiff's bill the denial must be taken for true, unless contradicted by two positive witnesses, or by one witness with circumstances equivalent to another. At the time when this rule was made, and during all the centuries which adhered to it, the plaintiff or any other person having an interest in the record could not be a witness. The answer was therefore good against all contradiction short of that furnished by two disinterested witnesses. But now there are statutes in all the States which authorize the testimony of a party to be given. This party came forward, and in the character of a witness repeated the allegations of his bill. Is this equal to a contradiction of the answer by two witnesses? Is it equivalent to one disinterested witness?

It is very clear, as matter of fact, that Stark never made any parole contract of any kind by which he sold, or promised to sell, this lot to Chapman or to Starr. Neither of them ever proposed to buy it from him or to give him any consideration for it, nor did he ever tell them, or give them reason to believe, that he would give it to them as a present.

Seeing and knowing this to be the case, they assert that they acquired a title by his silence. It may be that he did not at all times cry out in protest against their claim. When he first went to Portland, after the contract of partition was made, to wit, in June, 1850, he found Chapman, or somebody under him, in possession of the block. He knew that they had no title, and, according to the answer, he told them so, but he was not *bound* to tell them, for they knew it as well as he did. He could not give them the least information about his own rights or theirs which they did not already possess. Indeed they were much *more* fully informed than he was. Where one man misleads another and induces him to act upon a mistake of fact, that is a fraud. But a person who takes possession of my land, knowing himself to be a trespasser, cannot complain of me for quietly biding my time before I turn him out. Stark had a right to be silent if he chose until he thought proper to bring his action, provided he did not delay until the statute of limitation became a bar. It was several years before he got a legal title upon which he could bring ejectment. The plaintiff admits that when he did get his patent he asserted his right to the possession, and then he (Starr) brought the bill of equity of 1864 to determine their rights. The ejectment of Stark was brought soon after the equity suit was determined in his favour.

Chapman and Starr and the adverse claimants showed by their conduct that they were conscious of having no equitable title by, through or under Stark.

They understood perfectly that all the deeds and ratifications which they had fabricated among themselves were a succession of mere abortions, and that Stark had never done, or forborne to do, anything by which he was bound to make them a gift of his land. They therefore abandoned the claim under him, and set up a claim upon a title adverse to his.

It appears that the city of Portland, by its corporate authorities, claimed the land upon which the city was built, Block 81 inclusive. Chapman and his grantees of the block went over to the city, asserting that to be the true title, and fighting Stark upon that ground. Both Stark and the city got patents from the United States, and claimed under them adversely to one another. Chapman and Starr and the others associated with them, or claiming this lot under them, insisted with all due solemnity that Stark's patent was a fraud, and that they held, and would hold, the block in dispute under the opposing title of the city.

Now we submit that when they assumed this attitude of hostility to Stark, they *abandoned* all claim to every equitable interest which they might otherwise have had under his title. Their opposition to that title, and their averment that it was good for nothing, and their claim under an opposing title amounted to a recission of any contract which they could have had for a future conveyance of Stark's title. A vendee in possession, under an unexecuted contract, cannot set up an adverse title against his vendor without dissolving the equitable relations pre-

viously existing between them. Equity will not allow a vendee or a tenant to play fast and loose with the enemies of his landlord or vendor.

To show the circumstances as fully as possible which attended the plaintiff's disclaimer of the title, which he now urges, we will give references to record in the other suit, with dates.

13th January, 1864. Bill filed, claiming title to Block 81, under Stark, by same agreements and papers which are the foundation of the present suit. Rec. p. 62.

14th June, 1864. Defendant demurs on the ground that the bill showed no title in the plaintiff, p. 67.

17th June, 1864. Demurrer sustained, with leave to amend bill, p. 67.

19th August, 1864. Amended bill filed. This bill claims title for the plaintiff upon two grounds, one the same as in first bill, and the other on the ground that Stark's patent was void, pp. 67 to 69.

23d August, 1864. Demurrer to amended bill of complaint, on the ground that the plaintiff has no right to recover on either of the grounds set forth in the bill, p. 80.

Afterwards, (no date on record) demurrer sustained to that portion of amended bill which sets up the patent to the City of Portland, and alleges invalidity of Stark's patent. Demurrer overruled as to other parts of the bill. p. 82.

28th October, 1864. The order last mentioned set aside, and taken for nought. Another order substituted, that the plaintiffs have leave to amend their bill and are

ordered to elect which cause of suit they will proceed upon, and set it forth in a new bill, p. 82.

30th October, 1864. Second amended bill filed, alleging plaintiff's right under the Town Site Law, and the patent to the city; avering Stark's patent to be corrupt, fraudulent, and void, and omitting all claim or averment of title under Stark through Chapman, pp. 82 to 84.

23d November, 1864. Defendant's answer filed denying the title to the city, or the validity of the plaintiff's claim under the city's patent, and averring his own ownership, and the soundness of his own patent, and denying all the facts upon which the honesty of his title is impugned, pp. 88, 89.

12th June, 1865. Decree that the defendant's patent is void and shall be taken for naught. That the defendant be perpetually enjoined against taking possession, or bringing a suit to turn the plaintiffs out, p. 97.

14th July, 1865. Notice of appeal to the Supreme Court of the State, p. 97.

23d December, 1868. Entry of decree in favor of defendant on mandate of the Supreme Court of the United States, and order of the Supreme Court of the State in obedience thereto, pp. 99, 100, 101.

To bring ourselves strictly within the rules of 1870 we make the following:

ABSTRACT OF PLEADINGS.

BILL *complains that:*

Plaintiff by himself and tenants is in possession of block 81.

Defendant on the fifteenth of February, 1870, recovered judgment for the premises.

Defendant is threatening to issue execution.

Plaintiff has a good equitable estate in the said block and ought to have proceedings under defendant's judgment stayed and perpetually enjoined.

From the thirteenth of December, 1849, to the thirteenth of April, 1850, Daniel H. Lownsdale, Stephen Coffin and W. W. Chapman were in open and notorious possession of a 640 acre tract which includes the city of Portland and the lots in controversy.

Lownsdale, Coffin and Chapman laid off lots and sold to purchasers, undertaking to make title to purchasers.

Benjamin Stark, with full knowledge of these facts claimed an undivided half of the Portland town site adverse to the occupants.

On the first of March, 1850, at San Francisco, Lownsdale and Stark by and under their hands and seals divided the town site by a line where Stark street now is, giving to Stark the land north, and to Lownsdale the land south of the line.

By said agreement, Stark covenanted to ratify conveyances made by Lownsdale, or his attorneys, prior to the first of January, and upon certain conditions to ratify conveyances to the first of March. (Indenture exhibited.)

Coffin and Chapman had no notice of the partition until on or about the thirteenth of April, 1850.

Coffin and Chapman—Chapman being the attorney of Lownsdale—undertook to make a partial partition of a portion of the town site between Coffin, Chapman and Lownsdale, and they made conveyances one to the other of three blocks—block 81 being transferred in this way to Chapman.

John H. Couch was the attorney of Benjamin Stark.

On the thirteenth of April, 1850, Lownsdale and Couch applied to Coffin and Chapman to ratify the agreement between Lownsdale and Stark, which Coffin and Chapman refused to do unless all conveyances of lots or blocks up to that date should be confirmed, as by the agreement Stark was bound to confirm conveyances made prior to the first of January.

Thereupon, Coffin and Chapman, on the thirteenth of April, 1850, executed the paper marked "B," confirming the contract between Lownsdale and Stark, and then and there, Stark, by Couch, his attorney, accepted and ratified the said conditions in writing. The said writings of April 13th, 1850, were intended by Coffin, Chapman and Lownsdale, and Couch as the agent of Stark, to modify the agreement between Stark and Lownsdale, so as to make its terms and provisions

apply to Block 81, which had been disposed of on the twentieth of March, 1850.

Stark, a few weeks afterwards, came to Portland, was advised of, and acquiesced in, what had been done by said Couch his agent.

By reason of these stipulations Coffin and Chapman relinquished to said Stark their proprietary rights north of the line, except Block 81.

Plaintiff believes and charges, that, according to the true intent and meaning of the writings, Stark was bound to ratify and confirm all conveyances by Lownsdale or his attorney prior to the thirteenth of April, and Stark was to hold any title he might get as trustee for the occupants.

Stark did not demand a rescission of the agreement between him and Lownsdale.

On the third of October, 1850, Chapman sold for a valuable consideration Block 81 to the plaintiff and others.

The grantees of Chapman were in notorious possession of the block, which fact was known to Stark and his agent.

From 1851 to 1861 Stark stood by and did not forbid improvements to be made upon the land, but, on the contrary, told the occupants, and especially the plaintiff, that he had no title to the land in controversy, and that whatever title he might get under the Act of Congress of 1850 would be held by him in trust for the occupants.

On account of said acts and representations and agreements the several claimants of the said property

made improvements and spent large sums of money, which they would not otherwise have done.

Previous to 1863 Stark assured plaintiff that the title of the occupants of Block 81 was good, and that he had no claim to it or interest in the same, and, relying upon such assurances, the plaintiff bought and paid for the land, and he and his brother made divers improvements which are described.

Stark was several times present when improvements were made by the plaintiff, and assured him and his brother that their title was good, and would not be disturbed by him.

In the latter part of 1863, Stark began to deny the title of the occupants, and wrongfully and fraudulently refused to confirm their right, on the pretence that he owned the same.

The claims set up by Stark to the land in controversy are unjust against equity and good conscience. That Stark is estopped from making such claims, and ought to be restrained from the prosecution of his action.

Prayer for relief. That Stark be enjoined and restrained from prosecuting his action at law. That the plaintiff be adjudged the true owner of the premises. That Stark be required to release such title as he may have under his patent, and, within a reasonable time, to execute a deed of release and confirmation.

Amendment subsequently added to bill makes the further allegation, that defendant pretends to set up the former suit and decree therein as a bar to this one.

Recites: the proceedings in the former suit; the election of the plaintiff to rely upon his title under the city patent and averring that nothing else was determined by the final decree except that Stark's patent was good, and that of the city was not. Therefore the plaintiff insists that he ought not to be barred or estopped to claim equitable title by reason of the facts asserted in this suit.

Answer. Defendant admits that the plaintiff was in possession when the bill was filed, to wit: on the second day of August, 1870, but plaintiff under a writ issued upon his judgment got possession on the eighteenth of August, 1870. He denies that plaintiff has a good title or that Lownsdale, Coffin and Chapman, tenants in common or in possession as such from thirteenth December, 1849, to thirteenth April, 1850.

Does not know whether they occupied the land and sold lots during that time or not.

Denies that prior to thirteenth April, 1850, he knew of the possession, claims and undertakings of Lownsdale, Coffin and Chapman.

Admits that he claimed an undivided half of the whole tract, Lownsdale being his co-tenant, and sets forth the ground of his claim.

Admits that he and Lownsdale executed the paper of first of March at San Francisco, and made partition of the tract between them as alleged in the bill.

Denies that this was a settlement of controverted claims between defendant and Lownsdale. His right to

an undivided half had never been denied. It was a partition on the terms stipulated in the written agreement.

Does not know whether Chapman and Coffin had, or had not, notice of the agreement between him and Lownsdale before 13th April, 1850.

Denies that Coffin and Chapman came into possession as plaintiff alleges, or that any such facts were known to him on the first March, 1850.

Denies that Coffin and Chapman were referred to as persons whose refusal to ratify the indenture would give the defendant a right to rescind, nor was that covenant inserted for the purpose of allowing an alteration to be made in the terms of the contract.

Denies that Couch was his attorney, or authorized to settle with adverse claimants of the land assigned to him by the partition.

Denies that Couch bound him. He never assented to it as creating an obligation on him, but on the contrary, when his attention was called to it, he disavowed and repudiated it.

Denies that it was ever understood or agreed by him, or by any agent of his, that the agreement of first of March, 1850, should be modified so as to include Block 81, or any part of it, among the lots disposed of before the first of January, 1850.

Admits that shortly after the 13th of April, 1850, he came to Portland, was informed of Chapman's claim to Block 81, but denies that he assented to it.

Denies that he was bound to ratify any conveyance of Block No. 81, or other sales, up to 13th of April, 1850.

He denies that he was trustee of Block 81 for the use of occupants. He held the legal title for his own use and benefit.

Admits that he did not rescind the indenture between him and Lownsdale.

Admits that he got a patent in his own name for the land north of the dividing line.

Does not know about the conveyances of Chapman to the plaintiff and others.

Denies that Chapman, or any of his vendees, took possession with his acquiescence.

During his absence in the Eastern States, from October, 1850 to June, 1851, he had an agent at Portland, but denies that any act or omission of either himself or his agent had the effect to transfer right or title from him to the plaintiff, or any other person.

Admits that from 1851 to 1861 he was cognizant of the property and its uses, but denies that he acquiesced in the claims of persons in possession.

Denies that he told plaintiff, or anybody else, that he had no claim to the land in controversy; that whatever legal title he might obtain, he would hold for the use and convey to the occupants thereof; that he ever made any representations or agreements whereby plaintiff or other persons were induced to make improvements or pay money thereon. He never assured the plaintiff that the title of the occupants was good, or that he had

no claim. On the contrary, he always and uniformly asserted his own title in it for his sole use and benefit, and told all parties that he would ratify the conveyances which he was bound by his agreement to ratify, and none other.

Denies specifically and distinctly all charges in the bill that he promised to make title to the parties in possession, but avers that all his language and conversation with them imported the direct contrary.

Admits, as charged in the bill, that he set up the former decree in his favor as a bar to this suit, but declares that the record is not properly cited in the bill. Then proceeds to set it out more fully; and alleges that it is a conclusive bar to the present suit.

ASSIGNMENT OF ERRORS.

1. The circuit court erred in holding that the plaintiff, or Chapman, under whom the plaintiff claims, acquired the title to Block 81 by force and virtue of the contract between Chapman and Coffin of the twentieth of March, 1850, or the deed of that date made by Chapman and Coffin to Chapman, or by virtue of the paper made by and between Chapman and Coffin on the thirteenth of April, or by virtue of the ratification of the last mentioned paper by Couch so far as his interests were concerned.

2. All of the said written contracts, alleged and proved taken, separately or together, are insufficient to

establish any right or title in the plaintiff: nor is the plaintiff's claim strengthened by any credible evidence of the defendant's acts or forbearance, or of his words or his silence, and the court in holding the contrary committed manifest error.

3. The court erred in declaring that the plaintiff upon the facts shown stood in the position of having a conveyance of all Stark's right, title and interest on the fifteenth of April, 1850, the date of the paper signed by Couch, and that it conveyed his rights of possession and the rights incident to it.

4. The court erred in overlooking and in refusing to give its proper weight to the important fact that the parties now claiming Block 81 under defendant abandoned and denounced that claim when they took title under the city of Portland and compelled him by many years of expensive and troublesone litigation to maintain the honesty and justice of his own title.

5. The court erred in holding that the plaintiff was not concluded in this suit by the former adjudication on the same subject matter between the same parties.

COURSE OF ARGUMENT.

The grounds upon which we will try to sustain the first four assignments of error are sufficiently indicated in what we have already said. Indeed, the facts and our commentary upon them, as stated, constitute our argument, and need not be again repeated.

The ruling of the court that the former judgment was not conclusive is so palpable a violation of a well known principle that it is difficult to conceive how an argument can be made on one side or the other. The reasons given by Judge Sawyer for his decision we think will be wholly unsatisfactory. He does not anywhere misrepresent the facts which the former record discloses but about some of them he is wholly mistaken and upon all of them collectively he puts a legal construction wholly unwarranted. It is certainly a great error to say that the first suit was brought for two causes of action of which one only was tried. The "cause of action" (if such a phrase is applicable at all to an equity suit) was in this case the claim of the defendant to be the owner of the land which the plaintiff alleged in the former, as in this case, to be false and injurious to him. But the charge of falsehood of the defendant's claim was, in the other suit as it stood upon the first bill, alleged to be sustainable in two different ways. That is to say by evidence showing that he never had any title and also by evidence showing that he had parted with his title to the plaintiff. The support of the

plaintiff's claim or cause of action was voluntarily withheld upon the first hearing and a final adjudication was made against him for want, as he now asserts, of the evidence withheld. He did not withdraw any cause of action or claim. He continued to assert the same right in himself and the same wrong against the defendant and prayed for the same relief. He merely withdrew a part of his evidence and proceeded to a hearing without it which resulted in a final decree against him.

The judge admits that the decree bound the plaintiff and would estop him to bring a new bill to establish his title upon the evidence omitted, if the omission had been voluntary or negligent. We insist that the wilfulness or laches of a party can make no difference in the validity of a final decree for him or against him. But in fact and in truth this was not a forced exclusion of the evidence. He was not compelled to abandon his claim to the land under Stark's title, nor forced to take his stand upon the city title. The court ordered the plaintiff to make his election. The judge had no authority and the plaintiffs were not bound to obey it. It was mere *brutem fulmen*. At most it was only a suggestion of the court which the plaintiff could follow if he thought it right or resist it if he thought it wrong, and demand a regular decision for him or against him. But of his own free will and accord and without any coercion or compulsion he thought proper to agree with the court. Even if the order had been compulsory it did not, by its terms, compel the plaintiff to disclaim title under Stark. It gave him a free election and allowed

him to stand upon the alleged contract with Stark, or to put his case upon his claim under the city in opposition to Stark. He chose to disencumber himself of all connection with Stark's patent, denouncing it as corrupt and void, and to adopt, as the sole ground of his claim, his occupancy under the city patent. In the face of these facts how could the judge say that the plaintiff was not permitted to produce, on the first trial, the evidence on which he now seeks to recover the same thing?

As to the extent and force of the rule which makes a judgment or decree by a court of competent jurisdiction a bar to a second suit for the same thing between the same parties, it is too familiar, too well known, too universally acknowledged, to require the citation of authorities. The cases will be found collated in Smith's Leading Cases, vol. 2. p. 429, American Edition, Law Library, vol. 44, and in Brougham's Legal Maxims under the maxim, *interest reipublicæ ut sit finis litium.*

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